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Fourth report on responsibility of international organizations

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Addendum

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III. Responsibility of a State in connection with the act of an international organization

A. General remarks

53. According to article 1, paragraph 2, of the current draft articles:

> "The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization."[78]

As the related commentary explains,[79] the inclusion of this subject within the scope of the current draft articles is intended to fill a gap that was deliberately left in the articles on the responsibility of States for internationally wrongful acts. Article 57 of the latter articles stated that they were "without prejudice to any question of the responsibility of an international organization, or of any State for the conduct of an international organization".[80]

54. Not all the questions that may affect the responsibility of a State in connection with the conduct of an international organization should be examined in the present context. For instance, questions relating to attribution of conduct to a State have already been covered in the articles on State responsibility. It would clearly be preferable not to consider them here again. Thus, if an issue arises as to whether a certain conduct is to be attributed to a State or to an international organization or to both, the current articles will provide criteria only for settling the question as to whether that conduct is to be attributed to an international organization, while the articles on State responsibility will say whether that same conduct is to be attributed or not to a State.

55. The pattern set by the articles on responsibility of States for internationally wrongful acts does not provide a chapter in which one could appropriately include questions concerning State responsibility in connection with the act of an international organization. In the current draft a new chapter has to be envisaged for this purpose. The placing of this chapter in part one of the draft would have the advantage of addressing those questions in the same part that already deals with similar issues, relating to the reverse case of the responsibility of an international organization in connection with the act of a State.[81] If the option here suggested is taken, the heading of part one, which currently reads, "The Internationally Wrongful Act of an International Organization" may have to be modified as a consequence of including some provisions concerning the responsibility of States in that part.

56. Most of the questions to be considered in the new chapter relate to cases in which the responsibility of a State may arise in connection with a wrongful act of an international organization. However, in certain cases the act of the organization is not necessarily wrongful. This also occurs with regard to matters considered in chapter IV of the current draft articles, which also covers the case of a State or an

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[78] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[79] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, sect. C, para. 54.

[80] Ibid., *Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1), chap. IV, sect. E.1, para. 76.

[81] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

international organization coercing another entity into committing what would be, but for the coercion, an internationally wrongful act.

57. With regard to questions of the responsibility, if any, of States as members of an international organization for the wrongful act of the latter, the conclusions to be reached in relation to States would probably apply also to entities other than States that may also be members of the same organization. Should the draft articles to be adopted in this regard cover the latter members as well, the new chapter would extend beyond questions of responsibility of a State in connection with the act of an international organization. This could be done by referring to "members" instead of "States" in the relevant provisions; however, the current draft cannot deal also with the question of responsibility of entities other than States or international organizations. Insofar as members of an international organization other than States are themselves international organizations, another option could be to refer only to States in all the provisions of the new chapter and to write some specific, albeit parallel, provisions with regard to international organizations as members of other international organizations. The latter provisions could then be included in chapter IV. The current title of that chapter, which reads, "Responsibility of an international organization in connection with the act of a State or another international organization",[82] is wide enough to cover also the said provisions.

B. Aid or assistance, direction and control, and coercion by a State in the commission of an internationally wrongful act of an international organization

58. Chapter IV of part one of the articles on State responsibility[83] only covers cases of States that aid or assist another State in the commission of an internationally wrongful act, or direct and control another State in the commission of such an act, or else coerce another State to commit an act that would, but for the coercion, be an internationally wrongful act. It would be difficult to find reasons for ruling out that States may act similarly with regard to international organizations. It would likewise be difficult to assume that different rules should apply when, for instance, on the one hand, a State assists another State in the commission of an internationally wrongful act, such as the unlawful use of force, and, on the other hand, a State assists an international organization in doing the same.[84]

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[82] Ibid.

[83] Ibid., *Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1), chap. IV, sect. E.1, para. 76.

[84] Several authors held, sometimes implicitly, that similar rules should apply to the relations between a State and another State and to those between a State and an international organization. B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at p. 69, held that "the host State may bear international responsibility — in addition to the U.N. responsibility — for unlawful acts of the U.N. force if it commits an act of complicity in the aforesaid unlawful act, i.e., to instigate or facilitate its committal". P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, supra note 15, at pp. 468-469, referred to the case of a State putting its own territory at the disposal of an international organization in order to allow that organization to commit a breach of an international obligation. P. Sands, in P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 524, and D. Sarooshi, *International Organizations and the Exercise of Sovereign Powers*, supra note 6, at pp. 63 and 104, considered the case of aid or assistance by a State in

59. One could apply by analogy to the case of assistance given by a State to an international organization in the commission of an internationally wrongful act a rule which is in substance identical to the one that was expressed in chapter IV on State responsibility with regard to the relations between States. The same goes for all the other cases mentioned in that chapter. However, it seems preferable to include in the current draft certain rules that are specifically designed to cover the case in which a State assists an organization in the commission of an internationally wrongful act and the other cases envisaged in chapter IV on State responsibility. This solution, although largely repetitive, would contribute to clarity. Moreover, if the draft includes a chapter on responsibility of a State in connection with the act of an international organization, it would be odd if no mention were made of the case of aid or assistance, or of direction and control by a State in the commission of an internationally wrongful act by an international organization. Nor would the reason for omitting the case of coercion by a State on an organization be easily understood.

60. In its most recent report to the General Assembly,[85] the Commission raised the question of whether provisions on aid or assistance, direction and control, and coercion by a State should be included in the current draft. The great majority of the comments expressed by States in the Sixth Committee gave an affirmative reply to this question.[86] The few States that were not favourable to the inclusion of provisions on these issues, accepted the idea of a "reference clause" to the corresponding provisions on State responsibility[87] or suggested a saving clause, with a reference in the commentary.[88] While the International Criminal Police Organization held that the current draft would not be "the right place" to deal with the case of a State "aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act",[89] and the Commission of the European Union considered that the "existing rules on State responsibility may well be applied by analogy when a State does not aid or assist another State but an international organization to commit an international wrongful act",[90] the Organization for the Prohibition of Chemical Weapons and the World

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the commission of an internationally wrongful act by an international organization. M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/Boston/London: Nijhoff, 1995), p. 175, referred to the case that "a single member has in fact complete, or almost complete, control over the activities of the organization".

[85] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. III, sect. A, para. 26.

[86] Statements by China (A/C.6/60/SR.11, para. 52), Austria (ibid., para. 64), the Republic of Korea (ibid., para. 86), Italy (A/C.6/60/SR.12, para. 4), Belarus (ibid., paras. 49-50), the Russian Federation (ibid., para. 71), Romania (ibid., para. 77), Hungary (A/C.6/69/SR.13, para. 8), Denmark, also on behalf of Finland, Iceland, Norway and Sweden (ibid., para. 20), the Libyan Arab Jamahiriya (A/C.6/60/SR.19, para. 11) and Algeria (A/C.6/60/SR.20, para. 60).

[87] Spain stated that "[i]t might be sufficient to include a reference clause that would ensure the application, mutatis mutandis, of the rules already established under the articles on Responsibility of States for Internationally Wrongful Acts" (A/C.6/60/SR.13, para. 53).

[88] According to the statement made by France, "a saving clause accompanied by a commentary should be sufficient" (A/C.6/60/SR.11, para. 80). Israel held that "it might be appropriate to make some reference [...] in the commentary" (A/C.6/60/SR.16, para. 57).

[89] Letter of January 2006 from the General Counsel of the International Criminal Police Organization to the Legal Counsel of the United Nations, not yet published.

[90] Letter of 3 February 2006 from the Director General of the Legal Service of the Commission to the Legal Counsel of the United Nations, not yet published.

Health Organization expressed a view favourable to including provisions that are parallel to those contained in the articles on State responsibility.[91]

61. Some criticism of a general nature has been voiced with regard to articles 16 to 18 on State responsibility and to the parallel provisions of the current draft which consider aid or assistance, direction and control, and coercion on the part of an international organization.[92] Without going into the merits of that criticism, the need for coherence both with the articles on State responsibility and with those already included in the current draft suggests that, at the present stage, the wording of the model articles be modified only to the extent that is necessary to identify the cases that the proposed draft articles are intended to cover.

62. The State that aids or assists, or directs and controls, or coerces an international organization may or may not be a member State. Should it be a member State, the relevant conduct could not simply consist in participating in the decision-making process of the organization according to the pertinent rules of the organization. The influence which may amount to aid or assistance, direction and control, or coercion, has to be used by the State as a legal entity that is separate from the organization. This is not to say that, when acting within an organ of an international organization, a State may not commit an internationally wrongful act, or that, because of its conduct as a member, a State could not incur responsibility for an internationally wrongful act of the organization. The latter question will be considered later in the present report.[93]

63. Given the fact that, with regard to aid or assistance, direction and control, and coercion, there is no reason for distinguishing between the relations between a State and an international organization, on the one hand, and the relations between States, on the other, the articles to be drafted should closely follow the text of articles 16 to 18 on State responsibility. The headings need to be slightly modified in order to distinguish them from those which have been used in articles 12 to 14 of the current draft.[94] Article 19 on State responsibility contains a saving clause[95] which is not necessary to replicate in the present context. The following texts are here suggested:

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[91] Letters of 30 January from the Legal Adviser of the Organization for the Prohibition of Chemical Weapons to the Legal Counsel of the United Nations and 21 February 2006 from the Legal Counsel of the World Health Organization to the Legal Counsel of the United Nations, respectively, not yet published.

[92] Statement by Israel (A/C.6/60/SR.16, paras. 55-56). The criticism concerned the appropriateness "to limit a State's responsibility in situations of aid or assistance only to cases in which the act would be internationally wrongful if committed by that State".

[93] Infra, sect. III.D.

[94] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[95] Article 19 on the responsibility of States for internationally wrongful acts reads as follows: "This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State".

Article 25

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 26

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

Article 27

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(b) That State does so with knowledge of the circumstances of the act.

C. Use by a State that is a member of an international organization of the separate personality of that organization

64. Article 15 of the current draft concerns the case in which an international organization takes a decision binding its members or makes a recommendation or gives an authorization to members for the commission of an act that implies a circumvention, on the part of that organization, of one of its international

obligations.[96] In this type of case the organization refrains from acting directly. It apparently does not infringe any of its obligations, but achieves the same result, taking advantage of the separate legal personality of its members for avoiding compliance. While article 15 elicited in the Sixth Committee a variety of comments,[97] most, if not all, of these comments did not query the basic assumption that an international organization may incur international responsibility because of what it requires member States to do.

65. In the Sixth Committee the delegation of Ireland noted that article 15 "did not cover the situation where the act of the member State would not have incurred international responsibility if committed by the international organization".[98] The delegation of Switzerland added that "States should not be able to hide behind the conduct of the international organization".[99] While chapter IV of the draft was not the appropriate place for considering the problem from the angle of the responsibility of member States, it is indeed reasonable to envisage in the draft also the reverse situation in which a State may incur international responsibility because, in order to avoid compliance with one of its international obligations, it requires an international organization to act in its stead. In the latter case the entity that makes use of the separate legal personality of another entity is a State.

66. The case examined in article 15 and the reverse case now under consideration acquire practical importance when the entity which is required to act could do so without committing a breach of one of its international obligations and its conduct would therefore be lawful. One example could be that of a State that is a party to a treaty which forbids the development of certain weapons and that indirectly acquires control of those weapons by making use of an international organization which is not bound by the treaty.

67. The role that a member State may have within the organs of an international organization would not justify attribution of responsibility to the State for the conduct of the organization: this would be tantamount to denying the separate legal personality of the organization. Should the obligation also cover conduct that the State may take as the member of an international organization, responsibility, if any, of the State in this context would be for breach of an international obligation through its own conduct, not for what the organization did. One can take as an example the obligation of not acquiring nuclear weapons that non-nuclear States have under the Treaty on the Non-Proliferation of Nuclear Weapons.[100] This type of obligation would then appear to include the prohibition for a State party to the Treaty to contribute to the acquisition of nuclear weapons by an international

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[96] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[97] Statements by Ireland (A/C.6/60/SR.11, paras. 33-37), China (ibid., para. 51), Austria (ibid., paras. 61-62), France (ibid., para. 79), Japan (A/C.6/60/SR.12, para. 7), the Netherlands (ibid., paras. 15-18), the United States (ibid., paras. 26-28), Portugal (ibid., para. 35), Belarus (ibid., para. 50), the Russian Federation (ibid., paras. 68-69), Guatemala (ibid., para. 105), Hungary (A/C.6/60/SR.13, para. 7), Denmark, also on behalf of Finland, Iceland, Norway and Sweden (ibid., para. 19), Greece (ibid., paras. 26-28), Germany (ibid., para. 34), Switzerland (ibid., para. 45), Spain (ibid., para. 52), Poland (ibid., para. 59) and India (A/C.6/60/SR.18, para. 60). Comments on this question were also expressed by the observer of the European Communities (A/C.6/60/SR.12, paras. 13-14).

[98] A/C.6/60/SR.11, para. 33.

[99] A/C.6/60/SR.13, para. 45.

[100] United Nations, *Treaty Series*, vol. 729, No. 10405, p. 161.

organization of which the State was a member. Should, on the contrary, the obligation under a treaty be regarded as not covering conduct that States parties take as members of an organization, the conduct of a State within the organization would not as such cause responsibility of the State to arise. The responsibility of a State party to the treaty could be asserted only if it was held responsible for achieving, through the organization, a result that the treaty precludes.

68. While the case envisaged in article 15 and the reverse case under discussion here bear some similarities, it would be difficult to give weight to the same factors that article 15 considers relevant when one examines the question of the international responsibility of a State for the conduct of an international organization. For instance, it is not inconceivable, but it is unlikely, that a State be entitled to take a decision binding an organization or even to influence the conduct of the organization through a recommendation. The most likely case that may be relevant under the present perspective is that of a State acquiring certain international obligations with regard to some of its functions and then transferring those functions to an international organization. To return to the example of the non-proliferation of nuclear weapons, States that are bound by the Non-Proliferation Treaty could be held responsible if they established an international organization that acquired or developed nuclear weapons.

69. The European Court of Human Rights considered in some judgements the question as to whether States that are members of an international organization incurred responsibility for a breach of an obligation under the European Convention on Human Rights when those States had transferred certain sovereign functions to that organization. In *Waite and Kennedy v. Germany* the Court examined the question as to whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency in relation to claims concerning employment. The Court said that:

> "where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[101]

The Court nevertheless concluded that, although access to German courts was precluded by the immunity given to the relevant organization, the "essence of the applicants' 'right to a court'" under the Convention was not impaired, in view of the "alternative means of legal process available" to them.[102]

70. In *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland*, the European Court took a similar approach, but made the criterion of equivalence more

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[101] Judgement of 18 February 1999, *Reports of Judgments and Decisions*, 1999-I, p. 392 at p. 410, para. 67. A similar passage is contained in the unreported judgment of the same day in *Beer and Regan v. Germany*, para. 57. A more succinct version is in the judgement, again of the same day, in *Matthews v. United Kingdom*, *Reports of Judgments and Decisions*, 1999-I, p. 253 at p. 265, para. 32. The passage quoted in the text reflects the view that the European Commission of Human Rights had expressed in its decision of 9 February 1990 in *M. & Co. v. Germany*, *Decisions and Reports*, vol. 64, p. 138 at p. 145.

[102] *Reports of Judgments and Decisions*, 1999-I, p. 412, para. 73.

general. The application related to a State measure which had been taken for implementing an obligation stemming from a regulation of the European Community. The Court reiterated its view that a State could not free itself from its obligations under the European Convention by transferring functions to an international organization, because:

> "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (...). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (...)."[103]

The Court held that what was required from States parties to the Convention was that the relevant organization protected "fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".[104] If, as in the case in hand, an equivalent protection was granted, the State did not incur responsibility.

71. It is noteworthy that the Commission of the European Communities had taken the same view before the European Court of Human Rights when it said in its written observations in *DSR Senator Lines GmbH v. 15 Member States of the European Union* that:

> "While it may be true as a matter of principle that signatories to the Convention may not evade their obligations by transferring powers to independent international organizations, it does not follow that they can be held liable for the actions of those organizations in individual cases. In order to comply with their obligations under the Convention it is sufficient that they ensure the institution of an equivalent level of protection of fundamental rights within the organization in question."[105]

72. There is a significant body of literature which advocates the responsibility of member States when they "abuse the separate personality in order to commit illegal acts, or in order to evade their legal obligations".[106] As one author put it, "States should be prevented from creating an artifice with the intention of avoiding consequences which they would have to bear were they to carry out the activity, which they have assigned to the international organization, individually".[107] The emphasis is on the case of States establishing an international organization and entrusting it with functions in respect of which they are bound by obligations under international law while the organization is not so bound.[108] As the case of avoidance

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[103] Judgement of 30 June 2005, not yet reported, para. 154.

[104] Ibid., para. 155.

[105] Observations dated 1 March 2001, JURM (2000) 4030, para. 25. The European Court of Human Rights did not address the question in its judgement in the case.

[106] M. Hirsch, supra note 84, p. 179.

[107] K. Zemanek, in *Annuaire de l'Institut de droit international*, vol. 66-I (1995), p. 129.

[108] I. von Münch, *Das völkerrechtliche Delikt* (Frankfurt am Main: Keppler, 1963), p. 269, linked the responsibility of member States of an international organization to circumvention of their obligations through the use of the separate legal personality of that organization. I. Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge: Cambridge University Press, 1987), p. 121, maintained that:

of compliance with international obligations by transferring functions to an international organization is the same as the one that was envisaged in the instances of practice referred to in the previous paragraphs, it seems preferable to write a draft article that addresses that case. This option would not rule out other cases being treated in a similar way, by resorting to analogy.

73. In draft article 15 the verb "to circumvent" is used in order to describe the case in which an international organization incurs responsibility for avoiding compliance with one of its international obligations by adopting "a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization".[109] The term "circumvention" received some criticism in the Sixth Committee,[110] mainly because it appeared to be unclear, although the commentary attempted to explain that term, indicating in particular that no "specific intention of circumventing" was required.[111] In view of this criticism, it would be preferable to use different wording in the present context. A change of terminology does not raise questions of coherency in relation to draft article 15 because, as has been noted above, the cases in which an international organization would incur responsibility according to that article are different from those that are relevant for the draft article under discussion here.

74. While responsibility of members of an international organization may concern entities other than States, for the reasons expressed in paragraph 57, the draft that is here proposed only refers to States. Practice and literature point to the requirement that the act that implies avoidance of the international obligation should actually occur. Although, as has been noted above, the practical relevance of this case depends on the fact that the international organization is not bound by the obligation, this is certainly not a requirement and it may be preferable to say as much, as has been done in draft article 15, paragraph 3. The suggested heading attempts to follow the style of those of the previous draft articles in the chapter. The following text is therefore suggested:

"Just as a State cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations, the partner States of a common inter-State enterprise are jointly and severally responsible in international law for the acts of the enterprise". Similar views were expressed with regard to the relations between member States and international organizations by A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di diritto internazionale*, vol. 57 (1974), p. 250 at pp. 271-276; P. Sands, supra note 84, p. 524; D. Sarooshi, supra note 6, p. 64. After examining the dictum of the European Court of Human Rights in *Waite and Kennedy v. Germany* mentioned above, I. Brownlie, "The Responsibility of States for the Acts of International Organizations", in M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355 at p. 361, noted that, "whilst the context is that of human rights, the principle invoked would seem to be general in its application".

[109] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205. The text refers to paragraph 1; the same verb was used in paragraph 2, which considers the case in which an international organization authorizes a member, or recommends to a member, "to commit an act that would be internationally wrongful if committed" by that organization.

[110] See statements by the observer of the European Communities (A/C.6/60/SR.12, paras. 13-14), the Netherlands (ibid., paras. 15-18), the United States (ibid., paras. 26-28), Guatemala (ibid., para. 105), Hungary (A/C.6/60/SR.13, para. 7) and Greece (ibid., paras. 26-28).

[111] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, para. 4 of the commentary on article 15.

Article 28

Use by a State that is a member of an international organization of the separate personality of that organization

1. A State that is a member of an international organization incurs international responsibility if:

(a) It avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and

(b) The organization commits an act that, if taken by that State, would have implied non-compliance with that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.